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**Datasheet for the decision
of 15 March 2018**

Case Number: T 1695/13 - 3.2.06

Application Number: 03714111.6

Publication Number: 1485054

IPC: A61F13/20

Language of the proceedings: EN

Title of invention:

SHAPED TAMPON

Patent Proprietor:

THE PROCTER & GAMBLE COMPANY

Opponent:

Johnson & Johnson GmbH

Headword:

Relevant legal provisions:

EPC 1973 Art. 83

EPC R. 99(1) (c)

Keyword:

Admissibility of appeal - notice of appeal - request defining
subject of appeal - implicit (yes)
Sufficiency of disclosure - main request and auxiliary
requests (no)

Decisions cited:

T 0358/08, T 0256/13

Catchword:



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Case Number: T 1695/13 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 15 March 2018

Appellant: Johnson & Johnson GmbH
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 May 2013 concerning maintenance of the
European Patent No. 1485054 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division which found that European patent No. 1 485 054 in an amended form met the requirements of the EPC. In its statement of grounds of appeal it requested that the decision be set aside and the patent be revoked.
- II. In reply, the respondent (patent proprietor) requested that the appeal be found inadmissible or that it be dismissed, in the alternative that the patent be maintained according to one of auxiliary requests 1 and 2.
- III. The Board issued a summons to oral proceedings in reply to which the respondent, with letter of 18 September 2017, indicated that it would not attend.
- IV. The appellant filed further arguments in support of its case with letter of 15 February 2018.
- V. In its preliminary opinion in preparation for oral proceedings the Board indicated that the appeal appeared admissible yet questioned whether the patent according to the main request, auxiliary request 1 and auxiliary request 2 met the requirements of Article 83 EPC.
- VI. Oral proceedings were held before the Board on 15 March 2018 in the absence of the respondent. The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the European patent be revoked.

The respondent requested in writing that the appeal be rejected as inadmissible or dismissed as unallowable (main request), or that the patent be maintained in amended form on the basis of one of the first and second auxiliary requests filed with letter dated 22 April 2014.

VII. Claim 1 of the main request reads as follows:

"A catamenial tampon comprising a mass of absorbent material formed into a self sustaining shape, said self-sustaining shape comprising:
an insertion end,
a withdrawal end, and
a center region,
wherein the insertion end is opposed to the withdrawal end and the center region is located between the insertion end and the withdrawal end;
the center region having at least one perimeter which is less than both a largest insertion end perimeter and a withdrawal end perimeter,
said tampon having
a substantially serpentine outer surface and
a maximum perimeter region which has a maximum perimeter region average fiber density, and
a minimum perimeter region, which has a minimum perimeter region average fiber density,
wherein the minimum perimeter region average fiber density is greater than the maximum perimeter region average fiber density."

Claim 1 of auxiliary request 1 reads as for claim 1 of the main request with the word "catamenial" deleted and the expression "for vaginal insertion" inserted after the first recitation of the word "tampon".

Claim 1 of auxiliary request 2 reads as for claim 1 of the main request with the word "catamenial" deleted.

VIII. The appellant's arguments may be summarised as follows:

Admissibility

The request to set aside the decision and to revoke the patent in its entirety was implicit in the notice of appeal.

Main request

The requirements of Article 83 EPC were not met. The maximum and minimum perimeter regions could not be established due to inability to reliably measure the perimeters with protruding fibres extending from the surface of the tampon. A tampon was of a hydrophilic nature such that, after removal of the tampon wrapper, humidity and temperature over time would affect the claimed perimeters of the tampon. The extent of the maximum and minimum perimeter regions were also ill-defined such that the skilled person would not know precisely what region was claimed. Since no method of how to measure the average fiber density was disclosed, and since it was not a common parameter, the skilled person would not be able to carry out the invention.

Auxiliary requests 1 and 2

The same arguments applied to the auxiliary requests such that these also did not meet the requirements of Article 83 EPC.

IX. The respondent's arguments may be summarised as follows:

Admissibility

The appeal should be rejected as inadmissible since the

notice of appeal contained no "request defining the subject of the appeal".

Main request and auxiliary requests 1 and 2

The patent disclosed the invention sufficiently for a skilled person to carry it out. There was no reason to focus on tampons with minute perimeter differences in which measurement variability might affect whether or not they fall within the scope of the claim; a mind willing to understand the invention would be able to carry out the invention across its whole scope. The claimed perimeters and densities were claimed in relative, rather than absolute, terms such that no test method was necessary. Paragraph [0021] of the patent also defined the maximum and minimum perimeter regions such that these could readily be established in any tampon.

Reasons for the Decision

1. Admissibility of the appeal

1.1 To the Board's preliminary opinion, in point 1 of its communication, that a request for complete revocation of the patent was implicit in the appellant's notice of appeal the respondent provided no counter-argument. By appealing against the interlocutory decision, it is implicit that the appellant (as the opponent) did not agree with the amended form of the patent found allowable by the opposition division and thus was requesting revocation, since this would be the inevitable result occurring if the Board were to find the amended patent not allowable, this being the sole amended form against which the appeal could be filed

(cf. for instance T 358/08 and T 256/13). The Board thus herewith confirms its opinion that the notice of appeal contains a request in the sense of Rule 99(1)(c) EPC defining the subject of the appeal and that the appeal is therefore admissible.

2. *Main request*

2.1 *Article 83 EPC 1973*

The disclosure of the invention according to the main request does not meet the requirements of Article 83 EPC 1973.

2.1.1 The skilled person would be unable to carry out the invention as no indication is provided in the patent as to how a maximum perimeter region or a minimum perimeter region can be identified. Paragraph [0021] of the patent provides some information about where these regions should lie, but falls short in allowing the skilled person to identify these regions sufficiently to allow the invention to be carried out.

2.1.2 From paragraph [0021] it is evident that, for the claimed regions to be identified, firstly a largest perimeter of the insertion end and the center region, and secondly a smallest perimeter of the center region and the withdrawal end must both be established. The skilled person is unable to reliably establish such perimeters for a tampon of e.g. non-homogeneous material construction without detail of test conditions being provided for such measurement, including for example humidity conditions. This is particularly of concern since very small differences in perimeter (a maximum of about 6mm, see for example example 1 in the table on page 9 of the patent) are all that separate

the maximum from the minimum perimeters. Paragraph [0039] of the patent indicates possible tampon materials including the incorporation of superabsorbent polymers or absorbent gelling materials, which are known to swell significantly on exposure to moisture. With the scope of claim 1 not being restricted to homogeneous material distribution in the tampon, a non-homogeneous distribution of e.g. superabsorbents in the tampon will result in significant differences in the measured perimeters in positions in which superabsorbents are located depending upon the humidity at which the measurements are made. With no method indicated in the patent which compensates for such humidity effects, the skilled person would have no expectation of a reliable maximum or minimum perimeter measurement. Even with a homogenous distribution of superabsorbents, the local surface density of the fibrous structure would itself admit or not admit moisture more readily causing obvious differences in results when viewed from a technical standpoint.

- 2.1.3 The appellant also convincingly argued that fibers protruding from the surface of the tampon would even make the reliable measurement of the perimeter impossible. Indeed, it is common in the technical field of absorbent articles for dimensions (e.g. thickness, perimeter and diameter) to be measured with a known restraining force applied to the article in order to compress it a pre-determined amount. This eliminates significant measurement inaccuracies caused in such fibrous products by variably protruding fibers and allows a repeatable dimension to be established. Absent such a method to eliminate these variations, and contrary to the opinion of the respondent, the measurement inaccuracies would pervade the entire scope of the claim, not simply minimally differing maximum

and minimum perimeter values, since the variably protruding fibres would make the reliable measurement of any perimeter impossible.

2.1.4 Even if one were to assume that reliable perimeter measurements could be made, the skilled person would still be unable to reliably establish the extent of the perimeter regions. This was questioned by the Board in point 3.5 of its preliminary opinion to which the respondent presented no counter-arguments. Paragraph [0021] of the patent solely refers to the perimeter regions as extending 5 mm each side of the established maximum or minimum perimeters. Yet, this only indicates the limits of the regions in the axial direction of the tampon. The extent of the region in the cross-sectional direction of the tampon, perpendicular to the x-axis, is completely undefined. For example, the perimeter region could extend through the entire cross-section of the tampon, but could equally extend radially just a fraction of this e.g. just the outer third of such a cross-section, defining an annular 'tube' of the tampon and indeed logically a 'perimeter region' rather than a region including the radial centre of the tampon not lying at the perimeter. Lacking any method stating how the region as such is to be established, and absent any other indication of the extent of the maximum perimeter region or the minimum perimeter region in the direction perpendicular to the x-axis of the tampon, would result in the skilled person being unable to carry out the invention as claimed, since it is self-evident that any non-homogeneity throughout the section would have a fundamental impact on any results.

2.2 The skilled person would further be unable to carry out the invention according to the main request since the average fiber density at the maximum and minimum

perimeter regions cannot be reliably established. Notwithstanding the findings in 2.1.2 to 2.1.4 above, if one were nonetheless to assume that the maximum and minimum perimeter regions could be established, the skilled person would be unable, on the basis of the teaching in the patent, to reliably measure the average fiber density of these regions. This ability was also questioned in point 3.5 of the Board's preliminary opinion, to which the respondent failed to counter-argue.

- 2.2.1 In this regard it is firstly noted that the parameter 'average fiber density' is not a well-known parameter with an established and accepted method of measurement. Indeed the parameter is mentioned nowhere in the prior art nor is there any suggestion to be found therein that it might be commonplace.
- 2.2.2 Paragraph [0020] of the patent addresses the 'average fiber density' parameter indicating that this 'may be measured using Micro Cat Scan or Resin Embedded Microtome along with Scanning Electron Microscopy'. Simple reference to these machines or methodologies, however, does not provide a method which the skilled person can follow to enable him to reliably establish the required average fiber density for the following reasons.
- 2.2.3 From the entire patent specification the skilled person would not even know what was having to be measured. The expression 'average fiber density' can be interpreted in numerous different ways, at least including:
- a. the average of the density of the fibers as such i.e. the mass per unit volume of (only) the fibers themselves; and
 - b. the average distribution density of the fibers i.e.

the mass of fibers per unit volume.

No indication in the patent teaches the skilled person which of the above interpretations is required.

2.2.4 Which interpretation is intended is also of importance, despite solely the relative average fiber densities appearing in claim 1, since the non-homogeneous material distribution in the claimed tampon would have a fundamental impact upon the results achieved dependent upon the materials chosen. For example, consider two regions in a tampon, the first having a small number of high density fibers, the second having a large number of low density fibers. In each region the spaces between the fibres are filled with non-fibrous material (such as gelling materials or superabsorbents). Considering the two interpretations of 'average fiber density' a and b above, the resultant relative sizes of average fiber density will be dependent upon the interpretation used. This is illustrated in the table below:

	Region 1 Small number of high density fibers	Region 2 Large number of low density fibers
Relative average fiber density (interpretation a)	High	Low
Relative average fiber density (interpretation b)	Low	High

Thus, dependent upon the average fiber density interpretation a or b which is used, completely opposing relative results of average fiber density will be obtained. The skilled person would thus be unable to

carry out the invention with any reasonable degree of reliability.

2.2.5 As regards interpretation b, that average fiber density corresponds to the mass of fibers per unit volume, the skilled person is also hindered from reliably measuring this due to an inability to reliably measure the volume of the maximum or minimum perimeter region. Lacking any method describing how this might be done, the appellant argued, and the Board accepts, that the most evident way for the skilled person to do this would be to cut the regions out of the tampon. However, the tampon has a self-sustaining shape which the skilled person would not normally expect to be maintained in the maximum or minimum perimeter regions after their having been isolated from the tampon. There would thus be no reliable way of measuring the volume of the isolated regions, this being expected to change significantly on cutting out from the stabilised tampon. The average fiber density could thus not be reliably determined.

2.3 In summary therefore, the skilled person would be unable to carry out the invention as defined by claim 1 of the main request since it would be impossible to reliably determine the maximum and minimum perimeter regions in such a way as to derive any meaningful value of the average fiber densities in these regions. The disclosure of the invention according to the main request thus fails to meet the requirements of Article 83 EPC 1973. The main request is therefore not allowable.

3. *Auxiliary requests 1 and 2*

3.1 *Article 83 EPC 1973*

The disclosure of the invention according to auxiliary requests 1 and 2 also does not meet the requirements of Article 83 EPC 1973.

3.2 The amendments made to claim 1 of auxiliary requests 1 and 2 relative to the subject-matter of claim 1 of the main request do not address the objections found to be prejudicial under Article 83 EPC to the main request. This was already indicated in point 6 of the Board's preliminary opinion to which the respondent provided no counter arguments. The Board thus confirms its preliminary opinion that the disclosure of the invention according to the auxiliary requests 1 and 2 does not meet the requirements of Article 83 EPC 1973. Auxiliary requests 1 and 2 are thus not allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated